No. 17-1174

In the Supreme Court of the United States

LUIS A. NIEVES AND BRYCE L. WEIGHT,
Petitioners,

v.

RUSSELL P. BARTLETT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

"A policeman's lot is not so unhappy that he must choose between being charged with dereliction of duty if he does not arrest when he has probable cause, and being mulcted in damages if he does." *Pierson v. Ray*, 386 U.S. 547, 555 (1967). Yet that is the choice police officers face in the Ninth Circuit, which holds that a plaintiff may pursue a retaliatory arrest claim under 42 U.S.C. § 1983 even if the officer had probable cause to arrest the plaintiff. Because retaliatory motive is "easy to allege and hard to disprove," *Crawford-El v. Britton*, 523 U.S. 574, 585 (1998), this rule discourages officers from making legitimate arrests when suspects are exercising First Amendment rights—whether through political protest or personal insult. The Court should not create a "systematic disincentive to arrest where . . . arresting would serve an important societal interest." *Atwater v. City of Lago Vista*, 532 U.S. 318, 321 (2001). Instead the Court should hold—consistent with the common law and the Court's closest precedent, *Hartman v. Moore*, 547 U.S. 250 (2006)—that the lack of probable cause for an arrest is an essential element of a First Amendment retaliatory arrest claim under § 1983.[1]

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[1] Respondent wrongly asserts (Br. 1, 16-17) that the Petitioners and the Government advocate different legal rules for retaliatory arrest claims. Petitioners argue that a § 1983 claim of retaliatory arrest is barred if there was probable cause for the arrest, unless it falls within the "unique class" of claims alleging an official policy of retaliation described in *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1954 (2018). Petitioners understand the Government to be arguing for the same rule. While the precise contours of *Lozman*'s rule have not yet been drawn, that question is not presented in this case: Respondent has not alleged the existence of an official policy of retaliation.

Respondent fails to show why the common law and *Hartman* should not compel this rule. In holding that the existence of probable cause bars the closely related claim of retaliatory prosecution, *Hartman* established that common-law concepts are an appropriate guide for First Amendment-based claims. The common law has traditionally shielded police officers from liability when it authorizes them to make an arrest based on probable cause, regardless of alleged motive. And the facts of this case show why *Hartman*'s logic applies to retaliatory arrest claims: determining causation is often difficult due to a "police officer's wholly legitimate consideration of speech," *Reichle v. Howards*, 566 U.S. 658, 668 (2012), giving the existence or absence of probable cause "high probative force" on the merits of the claim, *Hartman*, 547 U.S. at 265.

Outcomes in the Ninth Circuit confirm that probable cause is a strong proxy for merit. Although retaliatory arrest cases go to trial even if there is probable cause for the arrest, Respondent has not shown that any of these cases resulted in a verdict in the plaintiff's favor. Instead, juries in these cases rejected the claims of retaliatory arrest. A no-probable-cause element will permit recovery for the arrests most likely caused by retaliatory animus while screening out claims with little merit.

I. The text of § 1983 permits a no-probable-cause element for retaliatory arrest claims.

In authorizing an "action at law" to remedy the deprivation of federal rights, "§ 1983 creates a species of tort liability." *Heck v. Humphrey*, 512 U.S. 477, 483 (1994). Accordingly the Court is "guided in interpreting Congress' intent [in enacting § 1983] by the common-

law tradition." *Malley v. Briggs*, 475 U.S. 335, 342 (1986). Ignoring this maxim, Respondent advances an interpretation of § 1983 that would undercut the basis for absolute and qualified immunity and create different standards for retaliatory prosecution claims against state and federal officials.

1. Respondent supports his textual argument with cases having nothing to do with § 1983 (Br. at 14-18), while ignoring the decisions interpreting it. "Although [§ 1983] on its face admits of no immunities, [the Court] read[s] it 'in harmony with general principles of tort immunities and defenses rather than in derogation of them.' " *Malley*, 475 U.S. at 339 (1986) (quoting *Imbler v. Pachtman*, 424 U.S. 409, 418 (1976)). Defenses and immunities " 'well grounded in history and reason' [were] not abrogated 'by covert inclusion in the general language' of § 1983." *Imbler*, 424 U.S. at 418 (quoting *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951)).

Accordingly the Court has recognized absolute immunity from § 1983 claims for legislators, *Tenney*, 341 U.S. at 379, judges, *Pierson v. Ray*, 386 U.S. 547, 554-55 (1967), and prosecutors, *Imbler*, 424 U.S. at 431, as well as qualified immunity for executive branch officials, *Wood v. Strickland*, 420 U.S. 308, 318 (1975) (invoking "common law tradition" of immunity).

Respondent has no logical basis for arguing (Br. 14-19) that the text of § 1983 permits these defenses and immunities but not a probable cause defense for police officers. The fact that police officers were never entitled to absolute immunity does not mean that Congress intended to abrogate the similarly well-grounded defense that officers *did* enjoy at common law.

Cf. Pierson, 386 U.S. at 557 (recognizing defense of good faith and probable cause for police officers arresting under law later ruled unconstitutional).

2. Accepting Respondent's textual argument would also mean creating different standards for retaliatory prosecution claims against federal and state officers. In attempting to distinguish *Hartman* (Br. 34 n.12), Respondent notes that the claim arose under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971), implying that *Hartman*'s rule does not—and cannot—apply to claims under § 1983. But *Hartman* did not suggest any distinction between retaliatory prosecution claims under *Bivens* and § 1983. *See Hartman*, 547 U.S. at 255 ("The Courts of Appeals have divided on the issue of requiring evidence of a lack of probable cause in 42 U.S.C. § 1983 and *Bivens* retaliatory-prosecution suits."); *id.* at 259 (observing that "a *Bivens* (or § 1983) plaintiff must show a causal connection" between retaliatory animus and injury to assert First Amendment retaliation claim); *id.* at 259 & n.6 (listing retaliatory prosecution claims under "*Bivens* or § 1983"). Adopting Respondent's argument would require the Court to hold that a retaliatory prosecution claim has different elements depending on whether it is brought against state officers under § 1983 or federal officers under *Bivens*.

II. The common law supports a no-probable-cause element for retaliatory arrest claims.

The "appropriate starting point" for determining the elements of a retaliatory arrest claim under § 1983 is the common law cause of action that provides the "closest analogy." *Heck*, 512 U.S. at 483, 484. Respondent's own claim most closely resembles a claim

for malicious prosecution, which requires the plaintiff to show a lack of probable cause. But even if the proper analogy were a claim for false imprisonment, the lack of probable cause would still bar recovery.

1. Respondent first argues (Br. 19-20) that the Court should ignore the common law entirely because the First Amendment did not exist at common law, but the common law analogy is fair. A claim for malicious prosecution and a § 1983 claim for retaliatory arrest in violation of the First Amendment address a similar problem: enforcing the criminal law due to an evil motive. *See Manuel v. City of Joliet, Ill.*, 137 S. Ct. 911, 925 (2017) (Alito, J., dissenting) ("[S]ubjective bad faith, *i.e.*, malice, is the core element of a malicious prosecution claim . . . ."). Not just the evil motives of private persons, but those of public officials too, *e.g. Atkinson v. Birmingham*, 116 A. 205 (R.I. 1922); *Bobsin v. Kingsbury*, 138 Mass. 538 (1884).

And *Hartman* confirms that common-law principles apply to First Amendment-based constitutional torts. There the Court ruled that the lack of probable cause is an essential element of a retaliatory prosecution claim. 547 U.S. at 265-66. If a no-probable-cause element—a concept ultimately rooted in the common law—is compatible with a retaliatory prosecution claim, it is compatible with a retaliatory arrest claim too.

2. The tort of malicious prosecution is the closest analogy to Respondent's claim. False imprisonment deals primarily with unlawful detention, while malicious prosecution involves the initiation of a criminal proceeding. *Compare* Restatement (First) of Torts §§ 35, 118 (1934) (Restatement) *with*

Restatement § 653. Trooper Weight validly arrested Respondent and then filed a criminal complaint, J.A. 20-30, which initiated a criminal proceeding. Restatement § 654 & cmt. a.

Accordingly, Respondent would have to show the absence of probable cause to pursue his claim at common law. The absence of probable cause "is as much an element in the action for a malicious criminal prosecution as the evil motive which prompted the prosecut[ion]," *Wheeler v. Nesbitt*, 65 U.S. 544, 550 (1860), and Respondent does not argue otherwise.

3. Even if false imprisonment were the closer analogy, the existence of probable cause for the arrest would still be a complete defense to liability. Respondent's narrow focus on distinctions between the types of arrests officers could make at common law (Br. 21-23) overlooks the more salient point that, both then and now, the law has always shielded police officers from liability for false imprisonment when it privileges them to make an arrest based on probable cause.

At common law, a defendant would not be liable for a claim of false imprisonment if the law privileged him in making the arrest. Restatement §§ 10, 118. The privilege to make a warrantless arrest was limited; in general, a private person could do so only if the person he arrested had actually committed a felony, attempted a felony in his presence, or was engaged in a breach of the peace. *See* Restatement § 119. The law typically gave peace officers somewhat broader privilege to arrest without a warrant, largely based on probable cause. *See* Restatement § 121 (privileging arrest by peace officer if he "reasonably suspects" that felony has been committed or that person arrested participated in

"an affray"). The greater privilege was afforded "because the peace officer has a duty to the public to prevent crime and arrest criminals," a duty that "would be seriously impaired" if officers were not "protected from liability for the consequences of honest and reasonable mistakes." Restatement § 121 cmt. g.

Respondent correctly points out that the types of arrests privileged at common law in the nineteenth century are different than the types of arrests privileged today. And he cites cases where officers were held liable for an unprivileged arrest: *e.g.*, when the crime was not one for which officers could arrest without a warrant in any circumstance, *Cook v. Hastings*, 114 N.W. 71, 72 (Mich. 1907); when officers could not arrest unless the crime was committed in their presence, *Adair v. Williams*, 210 P. 853, 853-54 (Ariz. 1922); or when the state's statute did not privilege warrantless arrest for a misdemeanor upon probable cause, *Stearns v. Titus*, 85 N.E. 1077, 1078 (N.Y. 1908). But his argument—that the Court should (at most) recognize a no-probable-cause element to retaliatory arrest claims only if the existence of probable cause would have privileged an arrest for that particular offense at common law in 1871 (Br. 21-23)—does not follow.

There is little reason to think that Congress intended the scope of the privilege to arrest to be frozen in time for purposes of § 1983 liability. The Court interprets § 1983 "in harmony with general principles of tort immunities and defenses." *Malley*, 475 U.S. at 339. And the general principle that the privilege to arrest would protect an officer from liability for the arrest was so "well-grounded in history and reason"

that Congress likely did not intend to "abrogate[]" it "by covert inclusion in the general language of § 1983." *Imbler*, 424 U.S. at 418. But specific rules governing the exact scope of authority to arrest were varied, subject to debate, and evolving.[2] *Atwater v. City of Lago Vista*, 532 U.S. 318, 331-45 (2001).

Today, officers have far greater authority to make warrantless arrests than they did in 1871. *Atwater*, 532 U.S. at 344 ("[T]oday statutes in all 50 States and the District of Columbia permit warrantless misdemeanor arrests by at least some (if not all) peace officers without requiring any breach of the peace . . . ."). And a warrantless misdemeanor arrest is privileged if supported by probable cause both as a federal constitutional matter, *see Virginia v. Moore*, 553 U.S. 164, 171 (2008) ("[W]hen an officer has probable cause to believe a person committed even a minor crime in his presence . . . [t]he arrest is constitutionally reasonable."), and generally as a matter of state law, *e.g.*, *Yeatts v. Minton*, 177 S.E.2d 646, 648 (Va. 1970); *Miller v. State*, 462 P.2d 421, 425-26 (Alaska 1969); *Coverstone v. Davies*, 239 P.2d 876, 878-79 (Cal. 1952). Holding that probable cause defeats a claim of retaliatory arrest is thus consistent with the common-law principle that an officer is not liable for an arrest that the law privileges him to make.

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[2] Indeed, Respondent's assertion that the existence of probable cause did not privilege a misdemeanor arrest is not entirely correct. The exact privilege depended on the jurisdiction's statutory or common law. For example, in some places the arrest of "nightwalkers" for disorderly conduct was privileged if probable cause was shown. *See Miles v. Weston*, 60 Ill. 361, 365 (1871).

Following Respondent's logic would mean that the rules for retaliatory arrest claims under § 1983 would turn on the "minor and often arbitrary" distinctions between misdemeanors and felonies. *Tennessee v. Garner*, 471 U.S. 1, 14 (1985). Although Respondent argues that this distinction is logical because retaliation is a less plausible explanation for arrests involving felonies than misdemeanors (Br. 25 n.11), that is not always true: today "numerous misdemeanors involve conduct more dangerous than many felonies." *Garner*, 471 U.S. at 14. This approach would also mean that liability for retaliatory arrest claims would turn on distinctions in how states extend the authority to arrest. *Compare, e.g.*, Cal. Penal Code § 836.5(a) (West) ("A public officer or employee, when authorized by ordinance, may arrest a person without a warrant whenever the officer or employee has reasonable cause to believe that the person to be arrested has committed a misdemeanor in the presence of the officer or employee that is a violation of a statute or ordinance that the officer or employee has the duty to enforce."), *with* Wis. Stat. Ann. § 968.07(1)(d) (West) ("A law enforcement officer may arrest a person when: . . . [t]here are reasonable grounds to believe that the person is committing or has committed a crime."). The Court has rejected the kind of "vague and unpredictable" standard that results from tying the protections of federal law to diverse state law rules. *Moore*, 553 U.S. at 175.

4. An officer's motive is irrelevant to the tort of false imprisonment, and an allegation of bad motive does not negate the privilege to arrest. So if a peace officer "ma[de] the arrest for the purpose of bringing the other before a court," then "the fact that [the

officer] has an ulterior motive in making it, does not make the arrest unprivileged." Restatement § 127 & cmt. a; *accord Wiegand v. Meade*, 158 A. 825, 826 (N.J. 1932) ("The essential thing in an action for false imprisonment is the constraint of the person without legal justification. The good or evil intention of the defendant does not excuse or create the tort.").

Respondent argues (Br. 24-25) that a peace officer could not defeat a charge of arrest without showing that the arrest was "*bona fide*," which Respondent takes to mean lacking evil motive. But Respondent misconstrues the term. While courts spoke of peace officers being protected when their "conduct is marked by good faith," that good faith (*bona fide*) was determined objectively: "where the arrest was shown to have been made upon information reasonably sufficient to warrant the belief that crime has been committed." *Neal v. Joyner*, 89 N.C. 287, 290 (1883). Thus it was stated that a peace officer would not be liable for "arresting a person *bona fide* on a charge of felony . . . though it turn out that no felony was committed," with the arrest being *bona fide* if the officer had "reasonable grounds to suspect" the person of a felony and detained him "for the purpose of securing him to answer a complaint."[3] 1 Francis Hilliard, The Law of Torts or Private Wrongs 222 (1859). So too in *Ledwith v. Catchpole*, 2 Cald. 291, 294-95 (K.B. 1783), where Lord Mansfield contrasted a *bona fide* arrest—one "done fairly and in pursuit of an offender"—with an arrest "by design or malice and ill will," and went on to

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[3] As the Restatement explains, the purpose of an arrest is determined objectively, and does not entail an inquiry into motive. Restatement § 127 cmt. a; *see also* Pet. Br. 46 n.7.

indicate that an arrest supported by probable cause would be *bona fide*. *See id.* at 295 ("[I]t would be a terrible thing, if under probable cause an arrest could not be made . . . .").

Respondent has not pointed to a single decision by a common law court holding that although a peace officer's arrest was privileged, the defendant might be liable because of his allegedly bad motive. *Dinsman v. Wilkes*, 53 U.S. 390 (1851), does not fit the bill. In that case the plaintiff was an enlisted man who sued his commanding officer "for punishment inflicted upon him for refusing to do duty, in a foreign port." *Id.* at 402. The Court characterized the action as one for "assault and false imprisonment" and ruled that the defendant could be liable if he acted out of improper motives. *Id.* Yet not only did the ruling reflect the unique relationship between captain and sailor, rather than peace officer and suspect, but the plaintiff was challenging the condition of his confinement, not the authority for his detention. *See id.* at 404 (recounting allegation that captain "inflicted punishment beyond that which, in his sober judgment, he would have thought necessary" by "confin[ing] him on shore" in a foreign prison "rather than on shipboard"). The case sheds no light on the prevailing common law rules that applied to peace officers making arrests for felonies and misdemeanors.

5. The Court's early qualified immunity cases do not suggest that an allegation of bad faith could subject an officer to liability for arrest despite the existence of probable cause. In *Pierson v. Ray*, 386 U.S. 547 (1967), for example, the question of the defendant officers' good faith arose because the statute they invoked to arrest

the plaintiffs was later ruled unconstitutional. *Id.* at 557. In relying on a common law principle that police officers who "reasonably believed in good faith that the arrest was constitutional" are protected from liability despite having no lawful basis to arrest, *id.*, the Court did not suggest that the common law would inquire into officers' motives when they *did* have a lawful basis to arrest.

III. *Hartman v. Moore* supports a no-probable-cause element for retaliatory arrest claims.

1. *Hartman*'s logic—that the complexity of retaliatory prosecution claims calls for a no-probable-cause element—applies with similar force to retaliatory arrest claims. Twice this Court has recognized that retaliatory arrest claims entail a more complex causal inquiry than ordinary claims of retaliation because officers may often legitimately take suspects' speech into account in deciding whether to arrest them. *Lozman v. City of Riviera Beach, Fla.*, 138 S. Ct. 1945, 1953 (2018); *Reichle v. Howards*, 566 U.S. 658, 668 (2012). This reality compounds the already-difficult task of disproving subjective motive and makes police officers particularly vulnerable to meritless retaliatory arrest claims.

Respondent's attempt to show otherwise by focusing on this case only underscores the point. Respondent asserts (Br. 37) that "some of [Respondent's] protected speech was temporally removed from the arrest and thus provides no basis for the arrest." That is both incorrect—Sgt. Nieves could validly have considered Respondent's earlier expression of hostility in assessing his state of mind as he approached Trooper Weight, Pet. Br. 23—and a tacit concession that the rest of

Respondent's speech could have legitimately informed the officers' reactions.

There is little force in Respondent's argument (Br. 38) that limitations on the First Amendment itself temper the complexity of retaliatory arrest claims. To be sure, speech is subject to reasonable time, place, and manner restrictions. But much of the speech that officers might consider in deciding whether to arrest—aggressive speech that is not a true threat or speech suggesting the suspect's motive—falls well within the protection of the First Amendment.

Because determining causation is difficult, the presence or absence of probable cause has "high probative force" in determining whether an arrest was caused by retaliatory motive. *Hartman*, 547 U.S. 265. The two cases Respondent cites in arguing otherwise (Br. 39) prove the point. In both cases, there was probable cause for the arrest, but the district court denied summary judgment—and in both cases juries found the arrest was not retaliatory. *Morse v. San Francisco Bay Area Rapid Trans. Dist.*, No. 12-cv-05289 JSC, ECF 119 (N.D. Cal. Sep. 29, 2014); *Mam v. City of Fullerton*, No. 8:11-cv-01242-JST, 2014 WL 12573550, at * 3 (C.D. Cal. July 24, 2014). It is telling that Respondent does not cite any retaliatory arrest case in which the arrest was supported by probable cause and a jury found that the arrest was retaliatory.

2. The fact that police officers lack the absolute immunity that prosecutors enjoy does not lessen *Hartman*'s application here. To be sure, the prosecutor's immunity, and the consequent need to show that the non-immune defendant's retaliatory motive induced the prosecutor to act, is a reason *why*

the causal connection in retaliatory prosecution claims is complex. *Hartman*, 547 U.S. at 263. But causation in retaliatory arrest claims is particularly complex too, if for a different reason. Evidence of probable cause has "powerful evidentiary significance" for both claims. *Hartman*, 547 U.S. at 261.

The Court's decision was not an automatic extension of prosecutorial immunity either, as Respondent suggests. Rather, it reflected the Court's conclusion that using an effective albeit imperfect screen for meritorious claims is preferable to incurring the costs of litigating marginal ones.[4] *Id.* at 263-65. Subjecting officers to liability for making reasonable arrests has costs, too. So given the "high probative force" of probable cause on the difficult question of causation, it "makes sense" to require the plaintiff to show its absence in order to maintain a claim of retaliatory arrest. *Id.* at 265-66.

3. Respondent argues (Br. 39-41) that even if *Hartman*'s logic applies to retaliatory arrest claims, it applies only if there is probable cause for the offense *charged*. But his explanation—that "[t]he true motivation for an arrest cannot be an offense unthought of by the arresting officer at the time he acted"—undercuts this arbitrarily narrow rule. For

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[4] Respondent is incorrect in stating (Br. 35) that the Court in *Hartman* required the plaintiff to show the absence of probable cause because only then could the claim "be litigated without intruding on prosecutorial decisionmaking." Rather, even if the plaintiff showed the lack of probable cause for the prosecution, he would still have to probe the prosecutor's thought process to prove causation. *See Hartman*, 547 U.S. at 265 ("[S]howing an absence of probable case may not be conclusive that the inducement succeeded . . . .").

example, Sgt. Nieves told Respondent that he was being arrested for "harassing my trooper," Resp. App. Disk 1 at 2:25—the very offense that the district court found probable cause to arrest for.[5] Respondent cannot reasonably maintain that the offense Sgt. Nieves *told Respondent he was being arrested for* could not plausibly have been Sgt. Nieves's true motivation for the arrest, just because Respondent was ultimately charged with the different but closely related offense of disorderly conduct. *Compare* Alaska Stat. § 11.61.110(a)(5)-(6) (person commits crime of disorderly conduct if person "challenges another to a fight" or "recklessly creates a hazardous condition for others by an act which has no legal justification or excuse") *with* Alaska Stat. § 11.61.120(a) (person commits crime of harassment in second degree if he "insults, taunts, or challenges another person in a manner likely to provoke an immediate violent response").

4. Using an "objective fact requirement" like probable cause, *Hartman*, 547 U.S. at 258, for retaliatory arrest claims is consistent with the Court's rejection of purely subjective standards in the criminal law context. In protesting that compliance with the Fourth Amendment does not preclude the finding of a

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[5] Respondent is wrong in asserting (Br. 9, 41-42) that the court of appeals never affirmed the existence of probable cause to arrest for any offense. The court of appeals said that the test for probable cause is whether "the information the officer had at the time of making the arrest" gave rise to probable cause, and then said, "We agree with the district court that it did." Pet. App. 3. In any event, the district court unambiguously concluded that Respondent's arrest was justified by probable cause, Pet. App. 21-22, and the court of appeals did not disturb that finding, Pet. App. 4-5.

First Amendment violation (Br. 27-28), Respondent misses the point. The objective standards of the Fourth, Fifth, and Sixth Amendments reflect the accumulated wisdom of the Framers, this Court, and the common law tradition that "evenhanded law enforcement is best achieved by the application of objective standards of conduct," *Kentucky v. King*, 563 U.S. 452, 464 (2011), that the motives of officers acting in fast-moving, "kaleidoscopic situation[s]" are "instinctive" and "largely unverifiable," *New York v. Quarles*, 467 U.S. 649, 656 (1984), and that it would be unwise "to throw down the bars which protect public officers from suits for acts done within the scope of their duty and authority, by recognizing the right of every one . . . to make use of an allegation that they were malicious in motive." *Chesley v. King*, 74 Me. 164, 175-76 (1882). The same considerations apply in determining the elements for a claim under § 1983.

Requiring a no-probable-cause element for retaliatory arrest claims is not fatally inconsistent with rules for selective enforcement claims under the Fourteenth Amendment, as Respondent suggests (Br. 29-30). There are good reasons why a no-probable-cause element does not apply to the latter. The standard for selective enforcement has its own "demanding" objective component, requiring the plaintiff to show both a discriminatory purpose and a discriminatory effect. *See United States v. Armstrong*, 517 U.S. 456, 463, 465 (1996). And while there is virtually no legitimate reason to consider a suspect's race when making an arrest, there is often a reason to consider the suspect's speech, complicating the officer's ability to defend himself from claims of retaliatory

motive. The differences in the nature of these claims justify different standards.

5. Experience in the Ninth Circuit confirms that it "makes sense" to apply *Hartman*'s no-probable-cause element to retaliatory arrest claims. *Hartman*, 547 U.S. at 265-66. That element is a strong proxy for merit. And without it, the difficulty of defending against retaliatory arrest suits under the Ninth Circuit's rule threatens to chill police officers from making otherwise legitimate arrests for fear of having to deal with a lawsuit like this one. The other mechanisms Respondent suggests for containing those costs do not do the trick.

Although Respondent does not acknowledge the costs of retaliatory arrest litigation, the Ninth Circuit does. That is why in *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892 (9th Cir. 2008), the court of appeals crafted a special rule of summary judgment for retaliatory arrest claims that weighs evidence of probable cause against evidence of motive. *Id.* at 901. Without this rule, the court recognized that "nearly every retaliatory First Amendment claim would survive summary judgment." *Id.* Respondent's attempt to recast the *Dietrich* rule as the faithful application of the principle that implausible claims cannot survive summary judgment (Br. 49 n.22) is unpersuasive. The Ninth Circuit's rule assesses probability, not plausibility, which is why the court's attempts to apply that rule result in split decisions—a fact that Respondent omits to mention. *See Maidhof v. Celaya*, 641 F. App'x 734, 737-38 (9th Cir. 2016) (Rawlinson, J., dissenting); *White v. Cty. of San Bernardino*, 503 F. App'x 551, 555 (9th Cir. 2013) (Graber, J.,

dissenting). The subjectivity of that standard offers little reassurance that reasonable arrests will avoid trial. And if this Court ruled in Respondent's favor, there would be no guarantee that the other circuits would feel similarly free to modify their rules of summary judgment.

Pleading standards and "regular" summary judgment do not address the problem. A plaintiff need only allege that the arresting officer made a questionable statement some time before, during, or after the arrest in order to survive dismissal under *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Of the eleven cases Respondent cites to argue that pleading rules and summary judgment filter out weak claims, only one (*Glair v. City of Los Angeles*, 437 F. App'x 581, 582 (9th Cir. 2011)) was dismissed for weak allegations or evidence of retaliatory intent under ordinary pleading or summary judgment standards:

- one case was decided in the defendants' favor because the plaintiffs had not engaged in protected speech, *Blomquist v. Town of Marana*, 501 F. App'x 657, 659 (9th Cir. 2012);
- one was decided for the defendants because the plaintiff did not preserve his First Amendment retaliation claim for appeal, *Kubanyi v. Covey*, 391 F. App'x 620 (9th Cir. 2010);
- two were decided for defendants because the plaintiffs had not offered *any* admissible evidence of retaliatory intent or had not alleged action "that would deter a person of ordinary firmness from filing complaints against police officers," *Gutierrez v. City of Carson*, No. LA

CV10-07627 JAK, 2011 WL 7129239, at *6, *11 (C.D. Cal. Dec. 16, 2011), *aff'd sub nom. Gutierrez v. Cty. of Los Angeles*, 545 F. App'x 701 (9th Cir. 2013); *Tahraoui v. Brown*, No. C11-5901BHS, 2012 WL 472898, at *2 (W.D. Wash. Feb. 13, 2012), *aff'd*, 539 F. App'x 734 (9th Cir. 2013);

- one held that the defendants were entitled to qualified immunity because "[t]he purported right to be free from a retaliatory arrest that is otherwise supported by probable cause was not clearly established in this circuit at the time of [the plaintiff's] arrest," *Picray v. Duffitt*, 652 F. App'x 497, 498 (9th Cir. 2016);

- two were dismissed based on the court's determination that probable cause defeated a claim of retaliatory arrest, *Willes v. Linn Cty.*, 650 F. App'x 444 (9th Cir. 2016), *cert. denied sub nom. Willes v. Linn Cty., Or.*, 137 S. Ct. 482 (2016); *Ikei v. City & Cty. of Honolulu*, 441 F. App'x 493, 495 (9th Cir. 2011);

- and three resulted in summary judgment in favor of defendants under *Dietrich's* altered summary judgment standard, *Maidhof*, 641 F. App'x at 735; *White*, 503 F. App'x at 553; *Dietrich*, 548 F.3d at 901.

Even under the *Dietrich* rule, meritless retaliatory arrest claims proceed to trial. *See* Pet. Br. 37-39. Respondent insists that two of these cases would have gone to trial anyway on excessive force claims (Br. 45), but he ignores the difference between proving that one's actions were reasonable under the circumstances

and the more difficult and uncertain task of refuting allegations of improper motive. And that two of the plaintiffs were journalists who had previously been critical of government officials only underscores the ease with which arrestees can invoke a prior history with police as the basis for a retaliatory arrest claim under § 1983. Juries found the claims unfounded in all of these cases. Pet. Br. 37-39. In fact, as mentioned, Respondent has not identified a single case in which the arrest was supported by probable cause and a jury decided the retaliatory arrest claim in the plaintiff's favor.

Nor is qualified immunity an adequate defense against meritless claims. Although it may be available when it is unclear whether the speech allegedly leading to the arrest is protected, those cases will be few and far between. Respondent argues (Br. 52) that qualified immunity would also apply "if the court finds that under the circumstances, a reasonable officer would have made the arrest irrespective of the speech, or that the speech itself made the arrest reasonable." But as this case shows, that is not how qualified immunity works. The court of appeals ruled that it has long been established that officers may not arrest in retaliation for the suspect's exercise of First Amendment rights even if there is probable cause to do so, and that whether the officers were actually motivated by retaliatory animus is a question of fact. Pet. App. 5-6. In virtually any case where plaintiffs allege some evidence from which a conceivable inference of retaliation may be drawn, qualified immunity will not be available.

6. Respondent overstates the danger of applying *Hartman* to retaliatory arrests. Because probable cause is a strong proxy for causation, a no-probable-cause element permits recovery for clear abuses. It is telling that Respondent plays up (Br. 33) the danger of premeditated acts of retaliation by citing a case where the plaintiff's arrest was "entirely without probable cause." *Beck v. City of Upland*, 527 F.3d 853, 857 (9th Cir. 2008). As that case shows, officers cannot simply manufacture probable cause when it suits them. Several of the cases cited by Respondent's *amici* in arguing against a no-probable-cause element also involve arrests without probable cause. *Collins v. Hood*, No: 1:16-cv-00007-GHD-DAS, 2018 WL 1055526, *6 (N.D. Miss. Feb. 26, 2018); *Laning v. Doyle*, No. 3:14-cv-24, 2015 WL 710427, *7, 16 (S.D. Ohio Feb. 18, 2015); *Fernandes v. City of Jersey City*, No. 2:16-cv-07789-KM-JBC, 2017 WL 2799698, *15 (D.N.J. June 27, 2017) (cited in Br. Amicus Curiae First Amendment Foundation et al. at 13-18). A no-probable-cause element would not bar recovery there. As for other cases cited by *amici*, opinions that assume the truth of the plaintiff's account are a weak basis for concluding that there is an epidemic of retaliatory arrests going unpunished in the circuits that require the plaintiff to show no probable cause. Far more reliable are jury verdicts, which confirm that a no-probable-cause element effectively screens out meritless claims while permitting meritorious ones to proceed.

Adopting a no-probable-cause element will not license impunity, as Respondent and his *amici* suggest. *Amici*'s claim that there is "no remedy in the complaint procedures of police departments throughout the nation" is inaccurate. Br. Amicus Curiae Three

Individual Activists 27. Not only do *amici* rely on the skewed sample of U.S. Department of Justice reports, and fail to acknowledge "well-structured" accountability systems that do exist, *see, e.g.*, *Collaborative Reform Initiative: An Assessment of the San Francisco Police Department*, Cmty. Oriented Policing Servs., U.S. Dep't of Justice, at 115, 130-38 (Oct. 2016), https://ric-zai-inc.com/Publications/cops-w0817-pub.pdf, they also ignore reforms implemented in response. *See United States v. City of Seattle*, No. C12-1282JLR, Dkt. 439 at 13-14 (W.D. Wash. Jan. 10, 2018) (finding Seattle Police Department "has achieved full and effective compliance" with consent decree). Most importantly, *amici* ignore the big picture: the widespread establishment of police complaint procedures and their continuing development. As even *amici* appear to concede (Activists' Br. 13), police departments correctly recognize that it is in their own interest to ensure accountability in order to maintain the community trust necessary to their mission.

For rare instances where retaliation appears systemic, relief may be had regardless of probable cause under *Lozman*, 138 S. Ct. at 1954-55, or through federal enforcement action (as *amici* show). For claims arising out of the "mine run" of arrests, *id.* at 1954, the lack of probable cause for the arrest should be an element of the claim.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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